

MONTANA LEGISLATIVE HISTORY

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AVAILABLEChapter 282 19 55Bill H _____ S 286 Original bill & history CH. Committee on JudiciaryHearing Date(s) Mar 03 ✓ CMar 09 ✓ C

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_____ C

Date Out Mar 09 ✓ CS. Committee on JudiciaryHearing Date(s) Feb 07 ✓ CFeb 08 ✓ C

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Feb 08 ✓ CDid this bill originate in an interim committee? Yes No

Committee _____

Report _____

SB 285 INTRODUCED BY PIPINICH, ET AL.

PROHIBIT PERSON FROM APPLYING FOR A SPECIAL LICENSE OR ENTERING A DRAWING FOR A MOOSE, BIGHORN SHEEP, OR MOUNTAIN GOAT LICENSE OR PERMIT FOR 10 YEARS IF THE PERSON IS CONVICTED OF THE UNLAWFUL TAKING OF A SIMILAR SPECIES OF GAME ANIMAL

2/01	INTRODUCED		
2/01	FIRST READING		
2/01	REFERRED TO FISH & GAME		
2/09	HEARING		
2/14	COMMITTEE REPORT—BILL PASSED		
2/15	2ND READING PASSED	50	0
2/16	3RD READING PASSED	50	0
	TRANSMITTED TO HOUSE		
2/20	FIRST READING		
2/20	REFERRED TO FISH & GAME		
3/02	HEARING		
3/03	COMMITTEE REPORT—BILL CONCURRED		
3/04	2ND READING CONCURRED	87	12
3/06	3RD READING CONCURRED	88	12
	RETURNED TO SENATE		
3/07	SIGNED BY PRESIDENT		
3/07	SIGNED BY SPEAKER		
3/08	TRANSMITTED TO GOVERNOR		
3/09	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 101		
	EFFECTIVE DATE: 10/01/95		

SB 286 INTRODUCED BY FRANKLIN, ET AL.

PROVIDE FOR PAYMENT OF COUNSEL FEES AND COSTS, INCLUDING BLOOD TEST COSTS, IN AN ACTION TO DETERMINE THE EXISTENCE OF THE FATHER AND CHILD RELATIONSHIP

2/01	INTRODUCED		
2/01	FIRST READING		
2/01	REFERRED TO JUDICIARY		
2/02	FISCAL NOTE REQUESTED		
2/06	FISCAL NOTE RECEIVED		
2/06	FISCAL NOTE PRINTED		
2/07	HEARING		
2/08	COMMITTEE REPORT—BILL PASSED		
2/11	2ND READING PASSED	49	0
2/13	3RD READING PASSED	50	0
	TRANSMITTED TO HOUSE		
2/14	FIRST READING		
2/15	REFERRED TO JUDICIARY		
3/03	HEARING		
3/10	COMMITTEE REPORT—BILL CONCURRED		
3/11	2ND READING CONCURRED	94	2
3/14	3RD READING CONCURRED	96	3
	RETURNED TO SENATE		
3/24	SIGNED BY PRESIDENT		
3/24	SIGNED BY SPEAKER		
3/27	TRANSMITTED TO GOVERNOR		
3/29	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 282		
	EFFECTIVE DATE: 10/01/95		

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0286, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

act providing for the payment of counsel fees and costs, including blood test costs, in action to determine the existence of the father and child relationship.

ASSUMPTIONS:

District Court personnel will need to do a determination of proportions of cost so that the judge can assess correct amount.

FISCAL IMPACT:

Passage of SB286 will have no fiscal impact on state government.

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

Based on assumption number 1, county district courts may incur additional costs, but the exact fiscal impact cannot be determined due to the lack of statistics.

Dave Lewis 2-6-95
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Eve Franklin 2-6-95
EVE FRANKLIN, PRIMARY SPONSOR DATE

Fiscal Note for SB0286, as introduced

SB 286

loading concerns that may be exceeded if additional people are moved into the trailer. The trailer park owner is responsible for those violations. **CHAIRMAN CRIPPEN** stated page 4, (c) should cover that. **Mr. Van Horst** stated the Montana Housing Providers are concerned with respect to the amendments suggested on page 4, Section 3, 70-24-436 as follows: Line 9, page 4, it appears that notice periods have changed for late rent, late charges or late common area maintenance fees from 14 days to 90 days. The only concern is that they must wait for the third violation, the third late payment, before an additional 90 days is offered. Should they wait 90 days after this has been violated three times? There could be a cash flow problem with the underlying mortgage. They ask that the time period be shortened. Line 16, page 4, two or more violations of the same rule allowing 90 days termination. The concern is for the community. An example would be a barking dog. If there is a double violation of the same rule, the concern for the community would be 90 days which is too long. He asked that that be changed back to 14 days. Line 20, which allows 30 days for disorderly conduct that results in the disruption of rights, poses the same community concern. To allow another 16 days could significantly infringe upon the law abiding member's ability to enjoy a peaceful surrounding. He asked the committee to consider changing the suggested 30 days back to the 14 days.

SENATOR HALLIGAN asked **CHAIRMAN CRIPPEN** where the 90 day requirements in (b) and (e) came from. **CHAIRMAN CRIPPEN** stated they used the minutes of the meeting two years ago. The 90 day period may be too long. It takes longer to move a mobile home than it would take to move out of an apartment. In (g) we have current language and the only change would be in the time allowed. **SENATOR HALLIGAN** would like to see the bill move out of committee and allow the parties to negotiate before the hearing in the House. We do need to have specific notice provisions in the bill to give guidance.

HEARING ON SB 286

Opening Statement by Sponsor:

SENATOR EVE FRANKLIN, Senate District 21, Great Falls, presented SB 286 in behalf of attorneys practicing in Great Falls who came across some problematic issues in parentage and paternity cases in Great Falls. This will permit a vehicle in the law to allow for collection of costs related to determining paternity.

Proponents' Testimony:

Jim Elshoff stated his purpose in being a witness today was to make an argument in favor of enacting a statute under the Uniform Parentage Act which would provide for attorney fees and court costs to the prevailing party. He submitted his written testimony to the committee, **EXHIBIT 2**. California, Colorado, Hawaii, Minnesota and Wyoming are the only states which have

enacted this section. Montana has omitted this section entirely. By omitting this section and precluding mothers and their children the opportunity to be reimbursed for attorney fees and court costs, tends to create a suspect classification of persons which distinguishes legitimate children from illegitimate children. In the 1990 Sasse case, where the subsection in 40-6-108 was stricken down, the 1991 Legislature made the change but that change was not reflected in the actual document itself in the statute. It was changed in 1993.

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses: None.

Closing by Sponsor:

SENATOR FRANKLIN offered no further remarks in closing.

HEARING ON SB 266

Opening Statement by Sponsor:

SENATOR BRUCE CRIPPEN, Senate District 10, Billings, presented SB 266. This bill brings parity to the pay scale for district court judges and justices of the Montana Supreme Court. Currently, Montana ranks 50th in pay scale to district judges and justices on the Montana Supreme Court. In some counties, the county attorneys who practice before the bar make more money. The reason for that is an automatic cost of living adjustment to their salaries. This matter has come before the legislature previously. This bill would raise district court judge's salaries from \$63,000 to \$72,000 a year in four installments over the next two years. The Montana Supreme Court Justices would have the same procedure raising their salaries from \$64,452 to \$77,492. The bill phases in an increase. In 1998, a judicial survey would be made by the Department of Administration of both district court judges and supreme court justices in our neighboring states. The states would be North Dakota, South Dakota, Wyoming and Idaho. They would determine the average salary and apply that to the rate scale under the bill. SENATOR CRIPPEN provided handouts which gave the pay scales of judicial salaries in the states mentioned, EXHIBIT 3 In 1994 there were approximately 30,000 filings in district court. That is up from 27,000 filings in 1993. A lot of highly qualified attorneys are not in the position to take the drop in pay necessary to serve as a district court judge or supreme court justice. They are the losers as well as the people of Montana. The legislature voted a raise in pay in 1991. This bill will set in law a procedure which will deal with this situation. Former State Senate President Jack Galt was unable to attend but would like to go on the record as supporting SB 266.

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL

DATE

2/2/95

[illegible]



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P.O. Box 53
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SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 2/7/95

FILE NO. SB286

February 7, 1995

Senate Judiciary Committee
Room 235, Montana Senate
Capitol Bldg., Helena, MT 59620

Hon. Senators:

Section 40-4-110, MCA (1993), provides for attorney fees in proceedings for dissolution of marriage, legal separation, division of property, child custody, visitation, child support, and health insurance.

However, Montana's Uniform Parentage Act, §§ 40-6-101 through 40-6-303, MCA (1993), contains no provision for attorney fees or court costs. This point was stressed recently in In re the Paternity of W.L. (1993), 259 Mont. 187, 855 P.2d 521, 50 St. Rep. 751.

ARGUMENT IN FAVOR OF ENACTING A STATUTE FOR ATTORNEY FEES AND COURT COSTS:

Women who are pregnant and must retain an attorney to prosecute a paternity action in order to receive child support, are thus treated differently than married women; this may create a suspect classification of persons, violative of the equal protection clause of the U.S. Constitution.

- blood tests cost approx. \$150.00 per person for all three persons--child, mother, and alleged father.
- the mother must pay these costs up front, since no presumption of paternity exists as with married women.
- as an infant's blood cannot be drawn until the infant is at least six (6) months of age, the mother is put to a substantial period of non-support, eventually creating arrearages.
- the current filing fee for a paternity action is \$90.00.
- the current decree fee for a paternity action is \$45.00.
- an average contested paternity case consumes at least five (5) hours of attorney time.
- average attorney fees are approx. \$90.00 per hour.

Thus, an unmarried woman in an average paternity case is likely to incur the following costs:

attorney fees:	\$	450.00
filing fee:		90.00
service of process:		20.00
blood test costs:		450.00
decree fee:		45.00
		=====

Total: \$ 1,055.00

In State of Arizona v. Sasse (1990), 245 Mont. 340, 801 P.2d 598, 47 St. Rep. 2171, the Montana Supreme Court held unconstitutional, § 40-6-108(1)(b), MCA, which placed a 5-year limit on actions to declare the non-existence of the father-child relationship. The Court's reasoning was that such a bar created a classification distinguishing children with presumed fathers from children without presumed fathers.

The current version of Montana's Uniform Parentage Act, as can be seen by the result in W.L., supra, establishes that same suspect classification, by depriving children of non-marital relationships of the support to which they are entitled. The duty of support begins at conception, and necessarily includes regular medical checkups, birthing expenses, delivery, and post-natal care.

The discrimination here, however, further extends to the mothers. They are the ones who must front the money to prosecute a paternity action. If they are unable to bring their action with a view to being reimbursed for attorney fees and court costs, they may likely be relegated to the welfare rolls.

In two (2) cases, the Montana Supreme Court held that if the effect of denying maintenance to a spouse in need would render (her) a ward of the State, then the trial court should award maintenance. In re the Marriage of D.C. v. M.C. (1981), 195 Mont. 505, 636 P.2d 857, 38 St. Rep. 2027; Stenberg v. Stenberg (1973), 161 Mont. 164, 505 P.2d 110.

I believe D.C. and Stenberg can be analogized here: if the effect of denying attorney fees and court costs is to relegate mothers to the welfare rolls, then fees and costs ought to be recoverable.

PROPOSED LANGUAGE:

Section 40-6-____, MCA:

"Attorney fees -- costs. (1) In any action or proceeding brought pursuant to this chapter, the district court shall award reasonable attorney fees to the prevailing party, for maintaining or defending such action or proceeding, including sums for legal services rendered and guardian ad litem fees, incurred, and costs incurred prior to the commencement of the proceeding or after entry of judgment. The Court may order that the amount be paid directly to the attorney, who may enforce the order in his or her own name.

(2) In any action or proceeding brought pursuant to this chapter, the district court shall award costs of the action, including reasonable costs for blood tests and for service of process; for lost wages, and for reasonable medical expenses incurred incident to the pregnancy."

CURRENT LANGUAGE OF § 16, UNIFORM PARENTAGE ACT:

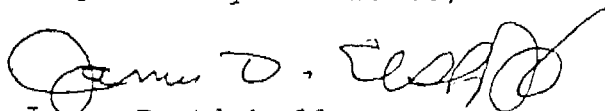
"The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority]."

As can be seen by the attached copy of § 16 of the Uniform Parentage Act, the several states which adopted that section did not do so uniformly, but omitted certain phrases, or modified them.

Montana has not adopted that section at all, and such non-adoption has left a gaping hole in the remedies which would restore the aggrieved party to whole.

Further, as a policy issue, the requirement to pay attorney fees and costs might discourage more responsibility on the part of would-be parents, and lower relegation to the welfare rolls.

Respectfully submitted,


James D. Elshoff

IN RE THE PATERNITY OF W.L.,
a Minor:
ELIZABETH LAMDIN,
Petitioner and Appellant,
v.
ANGELO FERRARA,
Respondent and Respondent.

No. 93-013.
Submitted on Briefs May 13, 1993.
Decided June 23, 1993.
50 St.Rep. 751.
Mont. ____
P.2d ____

PARENT AND CHILD — JURISDICTION — ATTORNEY AND CLIENT, Appeal by mother from the findings, conclusions, and order entered in paternity action. The Supreme Court held:

1. PARENT AND CHILD, A district court can depart from the child support guidelines, but only if it finds "by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or is inappropriate in that particular case." Section 40-6-116(6)(a), MCA. In such a situation, a district court is required to "state its reasons for finding that the application of such standards and guidelines is unjust to the child or a party or is inappropriate in that particular case." Section 40-6-116(6)(b), MCA.

2. PARENT AND CHILD, Section 40-6-116(3)(c), MCA, cannot be interpreted to include lost wages as a reasonable expense of the mother's pregnancy and confinement. The District Court did not err in failing to award the mother those lost wages.

3. PARENT AND CHILD - JURISDICTION, Under Section 40-6-118, MCA, the District Court retains jurisdiction to modify its initial support order to provide for the educational needs of the child.

4. PARENT AND CHILD, The District Court met its obligation to state the determining factors upon which it based its decision on child custody in the best interest of the child and did not err in failing to grant the mother sole custody.

5. PARENT AND CHILD, Best interest as defined at Section 40-4-212, MCA, is used to determine the type of custody arrangement for a child, not to determine the employment status of the parents. The court did not err in finding that the best interest of the child does not require the mother to stay home to raise him.

6. PARENT AND CHILD - ATTORNEY AND CLIENT, Montana statutes do not provide for the award of attorney fees in a paternity action. The District Court did not err in failing to award the mother her attorney fees in this action.

Affirmed in part; reversed and remanded in part.

Appeal from District Court of Yellowstone County.
Thirteenth Judicial District.
Honorable William J. Speare, Judge.

For Appellant: Donald L. Harris, Crowley Haughey, Hanson, Toole and Dietrich, Billings.

For Respondent: Mark D. Parker, Parker Law Firm, Billings.

CHIEF JUSTICE TURNAGE delivered the Opinion of the Court.

The mother appeals from the findings, conclusions, and order entered in this paternity action in the District Court for the Thirteenth Judicial District, Yellowstone County. We affirm in part and reverse and remand in part.

The issues are:

1. Did the District Court err by not applying the uniform child support guidelines to determine child support?
2. Did the court err by failing to award the mother past child support?
3. Did the court err by failing to award the mother her lost wages during the period of her confinement?
4. Did the court err by failing to order the father to pay child support for W.L.'s college education?
5. Did the court err by failing to grant the mother sole custody of W.L.?
6. Did the court err by finding that the best interest of W.L. does not require that the mother remain home to raise him?
7. Did the court err by failing to award the mother her attorney fees and costs?

W.L. was sixteen months old at the time of trial. His mother, a registered nurse, and his father, a cardiologist, never married. As is indicated by the issues on appeal, the focus of this action is on child support, not on paternity, which has been conceded.

W.L.'s father, who now lives in another state, has an annual income of nearly \$280,000. During the first year of W.L.'s life, the father voluntarily paid the costs of W.L.'s birth and \$2,000 per month in child support. This allowed W.L.'s mother to stay home and raise him during that time. After W.L.'s first birthday, the

him during that time. After W.L.'s first birthday, the father reduced his child support from \$2,000 per month to \$1,000 per month. W.L.'s mother returned to work and placed W.L. in day-care. Then she brought this action.

After a hearing, the District Court granted the parties joint legal custody of W.L. with the mother as residential custodian. It ordered the father to pay child support of \$950 per month. It denied the mother's request for attorney fees and costs and her lost wages immediately after W.L.'s birth. The court did not grant the mother's requests that it order the father to pay for a college education for W.L. or that it order the father to pay past child support. The mother appeals.

I

Did the District Court err by not applying the uniform child support guidelines to determine child support?

The District Court found that, from the evidence presented, necessary expenses for the care of W.L. are no more than \$700 per month. The court concluded that the child support guidelines apply. It stated, however, that

[c]hild support is meant to support the child, not the custodial parent of the child. The noncustodial parent has no obligation to support the custodial parent. Child support should not be used as a subterfuge to award maintenance to the custodial parent. [Citations omitted.]

As stated above, the court ordered child support of \$950 per month. The mother contends that the uniform child support guidelines enacted by the Department of Social and Rehabilitation Services pursuant to § 40-5-209, MCA, require the father to pay \$2,309.95 per month in child support.

The child support guidelines were amended after the hearing in this matter but before the court issued its findings, conclusions, and order. The effect of the amendment was to change the method by which child support is calculated on parental income in excess of \$39,500 per year.

This Court recently held that district courts are to determine child support obligations according to the guidelines in effect at the time the court makes its decision. *In re Marriage of Johnston* (Mont. 1992), 843 P.2d 760, 763, 49 St.Rep. 1047, 1049. The amount of child support awarded in this case is therefore governed by the guidelines which took effect on July 31, 1992.

The July 31, 1992 guidelines determine child support in cases in which the parents' combined income exceeds \$39,500 by adding 14 percent of the total income deemed available for child support purposes to a basic support amount. Section 46.30.1534, ARM. In making the child support order in this case, the District Court did not use that procedure.

[1] A district court can depart from the guidelines, but only if it finds "by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or is inappropriate in that particular case." Section 40-6-116(6)(a), MCA. In such a situation, a district court is required to "state its reasons for finding that the application of such standards and guidelines is unjust to the child or a party or is inappropriate in that particular case." Section 40-6-116(6)(b), MCA. In this case, the District Court has not met those statutory requirements for departing from the guidelines.

We remand this case for reconsideration of the proper amount of child support to be paid by the father to the mother and, if necessary, for entry of the required findings and conclusions in support of the court's determination as to child support.

II

Did the court err by failing to award the mother past child support?

The mother asks for past child support to reflect the difference between the amount the father should have been paying under the child support guidelines and the amount he actually paid. She concedes that the proper amount of past child support is established under the guidelines then in effect as 13.65 percent of the first \$39,500 of parental income, supplemented on a case-by-case basis from the remaining income. Section 46.30.1543(2), ARM (1990).

As discussed under Issue I, departures from the guidelines must comply with § 40-6-116(6)(a) and (b), MCA. On remand, the District Court is directed to make such adjustments to its findings, conclusions, and order concerning past child support as are necessary as a result of this Opinion.

III

Did the court err by failing to award the mother her lost wages during the period of her confinement?

Section 40-6-116(3)(c), MCA, provides that, in a paternity action, the court may direct the father to pay "the reasonable expenses of the mother's pregnancy and confinement." The mother contends that, under that statute, she is entitled to \$3,000 as compensation

for the net income she lost during the last weeks of her pregnancy and the first six weeks after W.L. was born.

[2] We decline to interpret § 40-6-116(3)(c), MCA, so broadly as to include lost wages as a reasonable expense of the mother's pregnancy and confinement. We hold that the District Court did not err in failing to award the mother those lost wages.

IV

Did the court err by failing to order the father to pay child support for W.L.'s college education?

Section 40-4-208(5), MCA, provides that a child support obligation terminates no later than the child's nineteenth birthday "unless the termination date is extended or knowingly waived by written agreement or by an express provision of the decree." The mother cites this Court's opinion in *Torma v. Torma* (1982), 198 Mont. 161, 645 P.2d 395, as authority that a district court cannot later modify child support to extend beyond a child's emancipation unless the original decree so provided. She claims the District Court erred in assuming it would retain continuing jurisdiction so that it could later provide for W.L.'s college education.

Section 40-4-208(5), MCA, and *Torma* do not control the issue of future educational support in this case, however. The mother did not bring her action under Title 40, Chapter 4, MCA, which governs child support in the context of marriage dissolution actions. She, instead, brought her action under the Uniform Parentage Act, Title 40, Chapter 6, MCA. In the instant case, § 40-6-118, MCA, controls. That statute provides that "[t]he court has continuing jurisdiction to modify or revoke a judgment or order: (1) for future education and support[.]" (Emphasis added.)

[3] Under that section of the code, the District Court retains jurisdiction to modify its initial support order to provide for the educational needs of the child. We therefore hold that the District Court did not err.

V

Did the court err by failing to grant the mother sole custody of W.L.?

There is no dispute about the actual custodial arrangement, just about whether it is called joint custody or sole custody. The mother contends that the court did not consider the factors required pursuant to § 40-4-212, MCA, for deciding custody. She argues that the case should be remanded for entry of further findings on the issue of custody.

The father points out that the court heard a day's worth of testimony in this case, and that it was not disputed that the mother is doing a good job of raising

W.L. or that she should be his primary custodian. He also points out the statutory presumption favoring joint legal custody. See § 40-4-222, MCA.

The District Court found that both parents and W.L. are in good health. It found that W.L. has lived with his mother since his birth and that the father has visited him on numerous occasions. These findings relate directly to factors listed under § 40-4-212, MCA, for determining the best interest of a child. The court made no findings which rebut the statutory presumption favoring joint custody.

[4] We conclude that the court has met its obligation to state the determining factors upon which it based its decision on child custody in the best interest of W.L. We hold that the court did not err in failing to grant the mother sole custody of W.L.

VI

Did the court err by finding that the best interest of W.L. does not require that the mother remain home to raise him?

The mother claims that it would be in W.L.'s best interest for her to work only part-time, because she alone is raising him. She proposed to work two days a week and to stay home with W.L. five days a week.

[5] As the father points out, the court cannot order the mother to stay home and raise W.L. Best interest as defined at § 40-4-212, MCA, is used to determine the type of custody arrangement for a child, not to determine the employment status of the parents. We hold that the court did not err in finding that the best interest of W.L. does not require the mother to stay home to raise him.

VII

Did the court err by failing to award the mother her attorney fees and costs?

The mother argues that, in light of the parents' relative incomes and the father's position that he should be obligated to pay only \$600 per month in child support, the District Court committed reversible error by failing to award her reasonable attorney fees and costs.

[6] Montana statutes do not provide for the award of attorney fees in a paternity action. We hold that the District Court did not err in failing to award the mother her attorney fees in this action.

Affirmed in part and reversed and remanded in part.

JUSTICES HARRISON, GRAY, TRIEWELER, HUNT, NELSON and WEBER concur.

STATE OF ARIZONA, KATHLEEN
ROSE SANCIPRIAN, and JERRY
D. COOK, Guardian ad litem
for JULIET MARGARITE ROSE,
a minor child,
Petitioners and Respondents,
v.
ALAN DOUGLAS SASSE,
Respondent and Appellant.

No. 90-172.
Submitted Sep. 9, 1990.
Decided Nov. 27, 1990.
47 St.Rep. 2171.
Mont. ____
P.2d ____.

PATERNITY--LIMITATIONS OF ACTIONS--CON-
STITUTIONAL LAW, Appeal from judgment declar-
ing appellant to be natural father of 12- year old girl.
The Supreme Court held:

1. Discriminatory classification based on il-
legitimacy is appropriate for intermediate scrutiny--a
statutory classification must be substantially related
to an important governmental objective, i.e., stable
families and prevention of stale claims.

2. The five-year limitation in this case is not sub-
stantially related to an important governmental ob-
jective; the five-year statute of limitations in §
40-6-108(1)(b), MCA, is unconstitutional.

Appeal from the District Court of Dawson County.
Seventh Judicial District.
Honorable Dale Cox, Judge presiding.

For Appellant: Kathleen M. Fritsch argued, Glen-
dive

For Respondent: Ann Hefenieder argued, Depart-
ment of Social and Rehabilitation Services, Child Sup-
port Enforcement Division, Billings (State of Arizona);
Jerry D. Cook, Glendive (guardian ad litem for the
child)

Affirmed.

JUSTICE SHEEHY delivered the Opinion of the
Court.

In this case, Alan Douglas Sasse maintains that the
five-year statute of limitations contained in § 40-6-
108(1)(b), MCA, bars the court from declaring that he
is the natural father of Juliet Margarite Rose, a minor
child. The District Court, Seventh Judicial District,

Dawson County, rejected Sasse's statute of limitations
claim and entered judgment declaring him to be the
natural father of Juliet Margarite Rose. From that
judgment, Sasse appeals. We affirm the District
Court.

The minor child, Juliet Margarite Rose, was born
in New Jersey on June 21, 1975. At the time of the
child's conception and birth, Kathleen was married to
Stelios Kazantzoglou. The mother, Kathleen, had
married Stelios in 1971, but was living apart from
Stelios and working in Tennessee. At that time, Sasse,
age 17, was in the Armed Services and stationed in
Tennessee. He frequented the cafe where Kathleen
worked and sometime in August or September of 197
Kathleen invited Alan to her home which resulted
one instance of sexual intercourse. Shortly thereafte
Sasse was transferred to another station.

Kathleen and Stelios divorced in September, 197
in West Virginia. The court there found that tl
parties had not lived together as man and wife for ov
two years and that no children were born to tl
marriage. Kathleen resumed her maiden name
Rose. On June 24, 1980, an action was brought in tl
State of Arizona by that state on behalf of Kathlee
(who had now married Cesar Sanciprian) agains-
Sasse for determination of paternity and for child
support for Juliet. Sasse made a special appearance
in that action and it was dismissed for lack of personal
jurisdiction over him.

The instant action was begun by Kathleen with the
State of Arizona as a co-plaintiff and was transferred
to Montana for prosecution, on September 25, 1987,
under the Uniform Reciprocal Enforcement of Sup-
port Act, when the child was 12 years old. Sasse filed
his answer to the complaint, noting that he had no
knowledge of Kathleen's marital status at the time of
their contact since she was living alone in her apart-
ment, but admitting that he had one occasion of sexual
intercourse with her in 1974. In his answer, he did not
plead the affirmative defense of the statute of limita-
tions.

The District Court appointed a guardian ad litem
for the minor child who was joined as a petitioner by
stipulation of the parties.

Pursuant to § 40-6-110, MCA, the District Court
caused notice to be given to Stelios Kazantzoglou of
the proceedings. He has not intervened or otherwise
appeared in the proceedings. The District Court, per-
ceiving that the constitutional validity of the five year
statute of limitations contained in § 40-6-108, MCA,
was involved in the action, gave notice to the Attorney
General of Montana, who decided not to appear.

The District Court refused to apply the statute of limitations on two principal grounds (1) that Sasse had waived the statute of limitations by not including it in his answer to the complaint, and (2) that in any event, the statute in this case was unconstitutional. We will confine our discussion in this case only to the constitutional issue since we find it dispositive.

By law, Stelios is presumed to be the father of Juliet because he and the mother, Kathleen, were married to each other and the child was born during the marriage. Section 40-6-105(1) (a), MCA. The presumption, however, may be rebutted in an appropriate action by a preponderance of the evidence. Section 40-6-105(2), MCA.

In a case where the existence of the father and child relationship is presumed, an action may be brought for the purpose of declaring the nonexistence of the presumed father and child relationship not later than five years after the child's birth. Section 40-6-108(1)(b), MCA.

On the other hand, an action to determine the existence or nonexistence of the father and child relationship as to a child who has no statutorily presumed father (for example, born out of wedlock) may be brought by the child up to two years after the child attains the age of majority, or may be brought by a state agency under Title IV-D of the Social Security Act before the child attains the age of majority. Section 40-6-108(3), MCA.

On the basis that § 40-6-108 creates a classification which distinguishes for disparate treatment children with presumed fathers and children without presumed fathers, the District Court held the statute in violation of the equal protection guarantees of Art. II, § 4 of the Montana Constitution and the Fourteenth Amendment of the United States Constitution.

Our cases on this point do not appear to be consistent. In *Borchers v. McCarter* (1979), 181 Mont. 169, 592 P.2d 941, we had a case where the mother of a child with a presumed father (born in wedlock) brought an action for support of the child against another man as the alleged natural father. Thus, the mother, in order to obtain support, had to establish a parent-child relationship between the child and a nonpresumed person. To do this she had first to rebut the statutory presumption of paternity in the presumed father. Because she had not rebutted the presumption within five years of the child's birth, this Court held that her claim was barred by the five-year statute of limitations.

In *State Department of Revenue v. Wilson* (Mont. 1981), 634 P.2d 172, the natural mother of a child born out of wedlock (no presumed father) brought an action

to determine the paternity of the alleged natural father. At that time, there was a three-year statute of limitations applicable to this class of action. This Court noted the disparate treatment of children born in wedlock and those born out of wedlock, in that children born in wedlock could bring an action for support against the presumed father at any time within the majority, whereas, under the three-year statute, the child born out of wedlock lost its right of determination of paternity and child support after three years from birth. We there held that the three-year statute was invalid under the Fourteenth Amendment of the United States Constitution because it was "not substantially related to a permissible state interest." *Wilson*, 634 P.2d at 174.

In *Matter of W.C.* (1983), 206 Mont. 432, 671 P.2d 621, the child was born in wedlock and thus had a presumed father. The mother and the presumed father were divorced nearly three years after the birth and the final decree stated that the child was born of the parties' marriage. Later, the mother married the alleged natural father, who filed an action to determine the parentage of the child. The District Court dismissed the petition on the basis that the alleged natural father was barred by the five-year statute of limitations from challenging the presumed father and child relationship. In upholding the application of the five-year statute of limitations, this Court distinguished the decisions of the United States District Court in *Mills v. Habluetzel* (1982), 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 and *Pickett v. Brown* (1983), 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372, which cases had struck down one-year and two-year statutes of limitations respectively. The distinguishing factor utilized by this Court was that in the case of *W.C.*, there was no question involved of the child's right to support. Since the action was brought by the natural father who was then supporting the child, this Court held that there was no discrimination as between children born in wedlock and those born out of wedlock as to their right to claim support.

In the case at bar, the District Court relied on the holding in *Wilson*, and decided that the five-year statute of limitations in § 46-6-108, MCA, was unconstitutional because it denied the equal protection of the laws "by affording a twenty (20) year limitation period for paternity actions involving illegitimate children and a five (5) year limitation period for paternity actions involving legitimate children."

In *Wilson*, this Court utilized the rational basis test in determining the equal protection issue. We here examine the level of test to be used and the application of the statutes of limitations in paternity cases in the light of *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910,

100 L.Ed. 2d 465 (1988). There the United States Supreme Court had before it a case involving Pennsylvania law where a child born out of wedlock was required to prove paternity to receive support from the natural father, and the suit to establish paternity was required to be brought within six years of the child's birth. By contrast, under Pennsylvania law, a child born in wedlock could seek support from his or her parents at any time.

In *Clark*, the United States Supreme Court determined to apply a level of intermediate scrutiny in determining the equal protection issues. The Court said:

"In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. (Citing cases.) Classifications based on race or national origin, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) and classifications affecting fundamental rights, e.g., *Harder v. Virginia Board of Elections*, 383 U.S. 663, 672 (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy (citing cases).

"To withstand intermediate scrutiny, a statutory classification must be substantially related to a governmental objective. Consequently, we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'" (Citing a case.)

Clark, 486 U.S. at 461.

In *Clark*, the Supreme Court then went on to examine the equal protection issue. It reviewed *Mills* and *Pickett*, referred to by this Court in *W.C.* It then went on to conclude that Pennsylvania's six-year statute of limitations violated the federal Equal Protection Clause.

Since the case at bar involves a discriminatory classification based on illegitimacy, it is appropriate for us under *Clark* to examine the equal protection issues here on the level of intermediate scrutiny. On that level, a statutory classification must be substantially related to an important governmental objective. That objective in this case is not hard to determine: The statutory classification is based on the state's interest in maintaining stable families and in the

prevention of stale or fraudulent claims. Countervailing these state's interests here established is likewise the state's interest in requiring proper support for all children, lest they become a burden upon the state or others. A limitations statute must also be examined as to whether it affords a reasonable opportunity to bring such suits. In *Mills*, 456 U.S. at 105, the United States Supreme Court noted the unwillingness of a mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval which might continue years after the child is born. That was one of the reasons why the United States Supreme Court in *Clark* struck down Pennsylvania's six-year statute.

Other factors also militate against the constitutionality of our five-year statute. Under § 40-3-108, MCA, a child with a presumed father may establish the presumed father's paternity at any time, which seems to negate any argument respecting stale claims. Moreover, advances in technology relating to genetic markers found in blood tests remove much of the fear of false or fraudulent claims of paternity. We noted the reliability of such blood tests in *Rose* [no relation to the parties at bar] v. District Court, Eighth Judicial District (1981), 192 Mont. 341, 628 P.2d 662; *Wilson*, 634 P.2d at 174. Under § 40-6-113(4), MCA, a district court may require the parties to submit to appropriate tests.

Indeed the accuracy of modern blood tests removes many of the justifications asserted for a five-year limitations statute. Such tests can refute false or fraudulent claims of paternity, or provide evidence that might otherwise be unavailable through the passage of time.

This case is prosecuted by the State of Arizona under the Uniform Reciprocal Enforcement of Support Act (URESA). The principal object of URESA actions is to fix the duty of support, an object that is accomplished here. The effect of this decision setting aside the five-year limitations in paternity actions should not be overestimated. We have simply set aside a time-bar that may otherwise have thwarted the truth in URESA or other paternity actions. There is no restraint under this decision that prevents a court in this state from considering other issues that might arise in such actions once the time-bar is lifted. The other provisions of URESA, as enacted in this state, take care of that. Thus our courts are not fenced off under URESA from considering other issues than support that may affect the child, or his adoptive, natural or presumed parents. Section 40-6-116, MCA,

gives the Court in URESA actions broad latitude in fixing a judgment:

"40-16-116. Judgment or order. (1) The judgment or order of the Court determining the existence or nonexistence of the parent and child relationship is determined for all purposes.

"...

"3(a) The judgment or order may contain any other provision directed against the appropriate party to the proceeding concerning the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the adjudgment, or any other matter in the best interest of the child. (Emphasis added.)"

So such issues as the best interest of the child can be separately considered by the Court in URESA actions.

On consideration of these relevant factors, we find the constitutional balance is tilted. The five-year limitation in this case is not substantially related to an important governmental objective, since under our statutes the limitations vary from case to case.

We therefore determine and hold, and agree with the District Court, that the five-year statute of limitations contained in § 40-6-108(1)(b), MCA, is unconstitutional.

We bring to the attention of the legislature, if it again considers this statute, a provision of the federal Child Support Enforcement Amendments of 1984 which requires all states participating in the federal child support program to have procedures to establish paternity of any child who is less than eighteen years old. 98 Stat. 1307, 42 U.S.C. § 666(a) (5).

Affirmed:

JUSTICE BARZ dissenting.

Section 40-6-108(1) (b), MCA, may not be in conformity with the federal Child Support Enforcement Amendments of 1984 requiring "[p]rocedures which permit the establishment of the paternity of any child at any time..." 98 Stat. 1307, 42 U.S.C. § 666(a) (5), however, the statute is nonetheless constitutional. The majority asserts that this Court's earlier decisions regarding this matter are not consistent. I disagree. This Court's earlier decisions are in fact consistent. It is the majority's present opinion that does not appear to be consistent.

In *Borchers v. McCarter* (1979), 181 Mont. 169, 592 P.2d 941, this Court correctly held that the five-year statute of limitations barred the mother from at-

tempting to prove the nonexistence of the presumed father and child relationship. Likewise, this Court correctly held in *Matter of W.C.* (1983), 206 Mont. 432, 671 P.2d 621, that § 40-6-108(1)(b), MCA, is *not* unconstitutional and the Montana statutes do not differentiate between children born of wedlock and children born out of wedlock. The statute rightfully protected the presumed father from having his father and child relationship challenged years later by the natural father.

It was this Court's decision in *State, Department of Revenue v. Wilson* (Mont. 1981), 634 P.2d 172, 38 St.Rep. 1299, holding a three-year statute of limitations unconstitutional because the statute applied to *all* children born out of wedlock, that pertains to the same reasoning employed by the United States Supreme Court in the line of cases holding these statutes unconstitutional.

In *Jimenez v. Weinberger* (1974), 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed. 2d 363, the Court struck down laws establishing disabilities on *illegitimate* children.

In *Levy v. Louisiana* (1968), 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, a wrongful death statute, which precluded recovery by *illegitimate* children, was declared unconstitutional.

In *Trimble v. Gordon* (1977), 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31, a statute barring *illegitimate* children from inheriting from an intestate father was held unconstitutional.

In *Weber v. Aetna Casualty & Surety Company* (1972), 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768, the Court held that *illegitimate* children were entitled to workman's compensation benefits relating to the death of the father; and in *Gomez v. Perez* (1973), 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56, the Court established that *illegitimate* children have a right to the father's support.

More recently, the Supreme Court struck down similar statutes in *Mills v. Habluetzel* (1982), 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770; *Pickett v. Brown* (1983), 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372; and *Clark v. Jeter* (1988), 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465. All these statutes deny *illegitimate* children a right enjoyed by legitimate children, and were found to be unconstitutional, as was Montana's statute in *Wilson*. However, § 40-6-108(1)(b), MCA, can be easily distinguished from the unconstitutional statutes. Notwithstanding that the statute creates a classification of children to be treated differently, the statute sustains more important government purpose than do the unconstitutional statutes and consequently, passes the muster of intermediate scrutiny analysis.

The precise statutory classification created by § 40-6-108(1)(b), MCA, must be accurately recognized before the intermediate scrutiny test can be properly applied. The statute does not draw a line between children born of wedlock and children born out of wedlock, and thereby deprive one class or the other of a constitutional right. It more correctly draws a line between children with presumed fathers who seek support from someone other than the presumed father and all others ("all others" include both children with presumed fathers and children without presumed fathers). The issue then becomes whether or not this classification is substantially related to an important governmental objective. The State's objective, as the majority states, is to maintain stable families and prevent stale or fraudulent claims. While it could be argued that these interests alone are important enough, there are additional interests that may be more important. The best interests of the child have always been the most salient consideration in determining family matters where children are involved. How can the best interests of the child be served by allowing paternity actions to be brought years after a child has developed a child-parent relationship with the presumed father? Upon careful examination of the statute it becomes obvious that it serves to *promote* legitimacy in that it ensures that the presumption of legitimacy will not be challenged, once the child reaches the age of five, by *anyone*. In other words, once the five-year statute has elapsed, if there has been no paternity action, the child's father is the presumed father. The argument, that a child with a presumed father should have the right to seek support from the natural father at any time up to the age of majority, actually confers upon that child a right other children *do not* have; the right to choose their father. Such a right is not provided by the constitution. This statute simply requires any challenge to the presumed father's status to be made within five years or not be made at all. The possibility now exists that the presumed father's relationship with the child can be disrupted by an alleged natural father at any time. This situation was precisely the kind that occurred in *Matter of W.C.*, and it was § 40-6-108(1)(b), MCA, that prevented the alleged natural father from disrupting the presumed father's relationship with his child. Once a child has reached the age of five, there unquestionably has been created a parent-child bond between the presumed father and the child. A paternity action challenging the presumed father and child relationship years after that relationship has been developed can serve only to damage and erode the bond between father and child.

Without § 40-6-108(1)(b), MCA, the possibility also exists that the presumed father will, upon discovering

his spouse's malevolent transgressions years later, claim not to be the natural father and attempt to establish the nonexistence of the presumed father and child relationship. In such a scenario, the mother and child may not, after many passing years, be able to locate the natural father for purposes of establishing a legal entitlement to support. Would it not be in the best interests of the child to continue to receive support from the presumed father and at least *have* a father?

This is similar to the situation that occurred in *Clay v. Clay* (Minn. Ct. App. 1986), 397 N.W.2d 571. A presumed father attempted to establish the nonexistence of his paternity during marriage dissolution proceedings. Minnesota's three-year statute of limitations (identical to ours except it reads three instead of five years¹) barred the presumed father from doing so and thereby appropriately protected the child. Minn. State. Ann. § 257.57 (1) (b). The constitutionality of the statute was raised and the appellate court affirmed the lower court's decision upholding the statute, saying the three-year statute "[w]as designed to promote legitimacy . . . [and] [p]ermitting a challenge to the legitimacy of a child more than three years after its birth would defeat the clear statutory purpose of promoting legitimacy." *Clay*, 397 N.W.2d at 577. *Clay* was appealed to the U.S. Supreme Court and the Court dismissed the appeal. (*Clay v. Clay* (1987), 484 U.S. 804, 108 S.Ct. 49, 98 L.Ed. 2d 14.) Therefore, it appears the United States Supreme Court was not troubled by the constitutionality question.

In *Michael H. v. Gerald D.* (1989), __ U.S. __, 109 S.Ct. 2333, 105 L.Ed. 2d 91, the United States Supreme Court looked at a statute providing that a presumption of fatherhood could be rebutted by blood tests, and only if motion for such tests was made within two years from the date of the child's birth. The Court found the statute to be constitutional and not a violation of the due process clause or the equal protection clause of the United States Constitution.

It must be re-emphasized that § 40-6-108(1)(b), MCA, affects only children that already have a presumed father. Therefore, the majority's concern that there be "proper support for all children, lest they become a burden upon the state" is unfounded because only children attempting to seek support from someone other than their presumed father, would be barred by the five-year statute of limitations. The

¹ A 1989 Amendment rewrote the Minnesota statute to include a longer limitation (one year after the child's majority) in situations where the presumed father becomes divorced from the child's mother and is unaware of the child's birth.

presumed father would still be legally required to support the child because he too would be barred by the same five-year statute from doing otherwise. The present case is illustrative of this point. The majority opinion notes that the West Virginia court, in granting the divorce between Kathleen and the presumed father, Stelios, found that the parties had no children born to the marriage. If such is the case, then § 40-6-108(1) (b), MCA, has been satisfied and the presumed father's status is sufficiently rebutted within the five-year period. If such is not the case, then Stelios remains the presumed father and is obligated to support the child; in either event the child is supported.

The statute not only serves to prevent stale or fraudulent claims and help maintain stable families, it also, more importantly, serves to protect the best interests of the child and the rights of the presumed father by promoting legitimacy and the sanctity of the family in which the child was brought up. The statute is not in conformity with the federal Child Support Enforcement Amendments of 1984 and should be changed, however, it is not unconstitutional as its classification is substantially related to a clearly important government interest.

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whose contract and tort counterclaims based on mother's failure to use birth control devices had been dismissed from paternity action. *Linda D. v. Fritz C.*, 1984, 687 P.2d 223, 38 Wash.App. 288.

Illegitimate children have the same judicially enforceable right to support as do legitimate children. *People in Interest of S. P. B.*, Colo. 1982, 651 P.2d 1213.

In paternity action brought by mother and child, evidence was sufficient to support the award of \$10,000 back child support. *Nettles v. Beckley*, 1982, 648 P.2d 508, 32 Wash.App. 606.

8. Record of proceedings

Trial court after informal hearing entered its "judgment" determining paternity and temporary custody in violation of statutes requiring that record of proceedings be kept, and that recommendation for settlement be made by court, and thus the judgment was void and of no force and effect. *Matter of TRG*, Wyo.1983, 665 P.2d 491.

9. Res Judicata

Judgment of domestic relations court declaring that child was issue of marriage between child's mother and her husband was not res judicata to action brought by putative father in juvenile court pursuant to R.C. §§ 3111.04, 3111.06(A) to determine paternity of child, absent showing that putative father was in privity with parties or persons in privity and identity of issues in divorce proceeding. *Gatt v. Ge-*

deon, 1984, 485 N.E.2d 1050, 20 Ohio App.3d 285, 20 O.B.R. 376.

Initial determination of custody in paternity proceeding was res judicata even though parties were living together at time and did not dispute or litigate custody. *Knutson v. Priemeau*, Minn.App.1985, 371 N.W.2d 582.

10. Review

In action brought under Uniform Parentage Act, role of Supreme Court in reviewing trial court's findings regarding visitation rights is to determine whether or not such findings are clearly erroneous. *C.B.D. v. W.E.B.*, N.D.1980, 298 N.W.2d 493.

District court's determination under Uniform Parentage Act on matter of child support is treated as finding of fact and will not be set aside by court on appeal unless it is clearly erroneous. *Id.*

Bastardy act of Washington territory was properly reviewable by state Supreme Court as successor to Territorial Supreme Court, and was properly invalidated by State Supreme Court, and thus statute which requires that paternity suits be tried to the court did not violate constitutional article which guarantees right of trial by jury on basis that since territorial bastardy act was enacted in penal rather than civil code, right to jury trial in filiation actions was included when State Constitution was enacted. *State ex rel. Goodner v. Speed*, 1982, 640 P.2d 13, 96 Wash.2d 838, certiorari denied 103 S.Ct. 140, 459 U.S. 863, 74 L.Ed.2d 119.

§ 16. [Costs]

The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority].

COMMENT

This allows the court to apportion the cost of litigation among the parties or, if a party is indigent, charge it to the appropriate public authority.

Action In Adopting Jurisdictions

Variations from Official Text:

California. Omits last sentence.

Colorado. Omits last sentence.

Hawaii. Substitutes "the State, or such person as the court shall direct" for "[appropriate public authority]".

Minnesota. Provisions relating to the subject matter of sections 16 and 19 of the Uni-

Act are combined in one section of the Minnesota act, which reads as follows:

257.69 Right to counsel; costs; free transcript on appeal.

Subdivision 1. In all proceedings under sections 257.51 to 257.74, any party may be represented by counsel. If the public authority charged by law with support of a child is a party, the county attorney shall represent the public authority. If the child receives public assistance and no conflict of interest exists, the county attorney shall also represent the custodial parent. If a conflict of interest exists, the court shall appoint counsel for the custodial parent at no cost to the parent. If the child does not receive public assistance, the county attorney may represent the custodial parent at the parent's request. The court shall appoint counsel for a party who is unable to pay timely for counsel in proceedings under sections 257.51 to 257.74.

"Subd. 2. The court may order expert witness and guardian ad litem fees and other costs of the trial and pre-trial proceedings, including appropriate tests, to be paid by the parties in proportions and at times determined by the

court. The court shall require a party to pay part of the fees of court-appointed counsel according to the party's ability to pay, but if counsel has been appointed the appropriate agency shall pay the party's proportion of all other fees and costs. The agency responsible for child support enforcement shall pay the fees and costs for blood tests in a proceeding in which it is a party, is the real party in interest, or is acting on behalf of the child. However, at the close of a proceeding in which paternity has been established under sections 257.51 to 257.74, the court shall order the adjudicated father to reimburse the public agency, if the court finds he has sufficient resources to pay the costs of the blood tests. When a party bringing an action is represented by the county attorney, no filing fee shall be paid to the clerk of court.

"Subd. 3. If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal."

Montana. Omits this section.

Wyoming. Omits last sentence.

Library References

Children Out-of-Wedlock §75.

C.J.S. Bastards § 137 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

1. Blood tests

In a civil paternity suit where an indigent defendant's motion for blood tests had been granted, the indigent is entitled to have the compensation of the expert conducting the tests paid initially by the county; the compen-

sation of the appointed expert shall be fixed by the court and ordered paid by the county, subject to being later taxable to the parties as costs in the action. Michael B. v. Superior Court of Stanislaus County, 1978, 150 Cal.Rptr. 586, 86 C.A.3d 1006.

~~§ 17. [Enforcement of Judgment or Order]~~

~~(a) If existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under this Act or under prior law, the obligation of the father may be enforced in the same or other proceedings by the mother, the child, the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral, or by any other person, including a private agency, to the extent he has furnished or is furnishing these expenses.~~

~~(b) The court may order support payments to be made to the mother, the clerk of the court, or a person, corporation, or agency designated to administer them for the benefit of the child under the supervision of the court.~~

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child relationship was not time barred. State of Ga. ex rel. Brooks v. Branwell, Minn.1991, 474 N.W.2d 346.

Uniform Parentage Act does not preclude application of doctrine of res judicata to determine parentage. State ex rel. Daniels v. Daniels, Colo.App.1991, 817 P.2d 632.

Under doctrine of res judicata, divorce decree which specifically found that two children were born as issue of marriage was bar to husband's proceeding under Parentage Act for determination of nonexistence of parent-child relationship; husband and mother were identical parties in divorce proceeding, divorce proceeding dealt with question of paternity and both district court and parties found that son and daughter were born of marriage, question of paternity was directly related to final adjudication of divorce proceedings, and both husband and mother had same fundamental interests in determination of paternity in divorce proceeding. Matter of Paternity of JRW, Wyo.1991, 814 P.2d 1256.

Res judicata did not bar child from bringing paternity action under Uniform Parentage Act, although child's mother had brought unsuccessful paternity action against same putative father pursuant to prior paternity statute; child was not substantially identical party as mother and was not in privity with mother since child had different interests in establishing existence of paternity. Ex parte Snow, Ala.1987, 508 So.2d 266, on remand 508 So.2d 269.

9a. Estoppel

Adjudication in dissolution or annulment action concerning paternity of child estops husband or wife from raising that issue in any subsequent action or proceeding. In re Marriage of Holland, 1986, 730 P.2d 410, 414 Mont. 224.

§ 16. [Costs].

Action in Adopting Jurisdictions

Variations from Official Text:

Colorado. In first sentence, substitutes "shall order" for "may order".

Hawaii. Substitutes "genetic tests" for "blood tests".

New Mexico. Section reads: "The court may order reasonable fees of counsel, experts, the child's guardian and other costs of the action and pre-trial proceedings,

9b. Collateral attack

Former husband's failure to raise defense of nonpaternity during dissolution proceedings in which child support orders were issued barred him from collaterally attacking the determination of paternity which implicitly supported the award of child support incident to that proceeding. State ex rel. Daniels v. Daniels, Colo.App.1991, 817 P.2d 632.

9c. Prejudgment interest

Mother's claim in paternity action to recover past expenditures for child born out of wedlock was unliquidated and did not earn prejudgment interest; amount due was contingent upon court's determination as to father's liability for past support. R.E.M. v. R.C.M., Mo.App.1991, 804 S.W.2d 813.

10. Review

Whether requested name change is in the best interest of minor child is factual determination for the trial court but, when facts are presented by stipulations, affidavits, and other documentary material, appellate court may draw its own conclusions from the evidence. D.K.W. v. J.L.B., Colo.App.1990, 807 P.2d 1222.

Although dismissal of paternity action brought pursuant to Alabama Uniform Parentage Act as part of multiparty, multi-claim action constituted final judgment for purposes of appeal under Rule 54(b), appeal was dismissed due to absence of Rule 54(b) certification, rather than remanded, where appeal was filed outside 14-day period, and record did not reflect that paternity case was properly joined with divorce action or required waivers of right to jury trial by all parties. C.L.D. v. D.D., Ala.Civ.App.1991, 575 So.2d 1140.

Notes of Decisions

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1. Blood tests

In paternity action in which results of genetic testing clearly excluded indigent putative father as natural father of child, costs of genetic testing were properly taxable against mother and would thus be paid by county child support agency under statute authorizing payment of court costs by local social service agency when custodian was recipient of Aid for Dependent Children and defendant was found to be indigent. Little v. Stoops, 1989, 585 N.E.2d 475, 65 Ohio App.3d 758.

After father established paternity, trial court abused its discretion in awarding him \$408 as costs for blood tests in absence of any record evidence as to actual costs of tests; although father had attempted to introduce report of tests into evidence, it was excluded because it had not been designated as exhibit pursuant to pretrial order. Matter of SAJ, Wyo.1989, 781 P.2d 528.

2. Attorney's fees

Mother was entitled to attorney fees and costs to establish paternity, even though neither father nor mother had much more than minimal assets; father contested paternity even after first blood test establishing paternity and had higher net income, and mother had custody of child and incurred further costs, even though motion for summary judgment was confessed after results of second blood test. Carnes v. Dressen, Ill.App. 4 Dist.1991, 574 N.E.2d 845.

Awarding attorney fees to mother who prevailed in paternity action was not an abuse of discretion, even though putative father argued that he was financially unable to pay mother's attorney fees; there was no error in procedure in awarding such attorney fees where court received extensive evidence concerning both parties' relative income and living expenses and about amount of time and labor mother's attorney put into the case; and as to that court thought fees were mandatory when mother prevailed; trial court's comment that mother, having prevailed, was entitled to attorney fees meant that court, in its discretion, determined mother to be entitled to fees after she prevailed. Jiles v. Spratt, 4 Dist.1990, 142 Ill.Dec. 21, 552 N.E.2d 371, 195 Ill.App.3d 354.

Fee-shifting provision of Illinois Parentage Act did not extend to attorney fees incurred by mother in successfully defending putative father's appeal of paternity judgment, notwithstanding mother's contention that term "action" in provision was broad enough to include appeals. *Brazinsky v. Chervinko*, 1989, 139 Ill.Dec. 203, 545 N.E.2d 588, 192 Ill.App.3d 124.

Application for fees filed by attorney who represented mother in proceeding for visitation brought by father under Parentage Act should have been made in pending parentage proceeding and could not, during period of that proceeding, be brought as new action in another court. *Gilllin v. Hartmann*, 1988, 125 Ill.Dec. 426, 530 N.E.2d 584, 175 Ill.App.3d 805.

Award of attorney fees and expenses at trial of paternity action is a matter of trial court's discretion and will not be

disturbed absent abuse of that discretion. *J.L.B. v. T.E.B.*, Minn.App.1991, 474 N.W.2d 599.

Appointment of counsel for father in paternity proceeding was a condition precedent to any obligation of the Department of Health and Social Services to assume the cost of representation. *State By and Through Dept. of Family Services v. Jennings*, Wyo.1991, 815 P.2d 1149.

Court's award of attorney fees of \$775 to mother in action to modify child support payments was proper based upon evaluation of resources of parties and fact that fees represented less than half of legal expenses incurred by mother. *Pippins v. Jankelson*, Wash.1988, 754 P.2d 105, 110 Wash.2d 475.

3. Appellate fees

Award of appellate fees rests within discretion of Court of Appeals on appeal of paternity action. *J.L.B. v. T.E.B.*, Minn.App.1991, 474 N.W.2d 599.

§ 17. [Enforcement of Judgment or Order].

Action in Adopting Jurisdictions

Variations from Official Text:

California. In subsec. (c), second sentence reads: "All remedies for the enforcement of judgments, including imprisonment for contempt, apply."

New Mexico. In subsec. (a), substitutes "any interested party" for remaining text following "other proceedings by".

Subsec. (c) reads: "The court may order support payments to be made to the mother, the clerk of the court, or a person, corporation or agency designated to collect or administer such funds for the benefit of the child, upon such terms as the court deems appropriate."

§ 18. [Modification of Judgment or Order].

Action in Adopting Jurisdictions

Variations from Official Text:

California. Section now reads: "The court has continuing jurisdiction to modify a judgment or order made under this part. A judgment or order relating to an adoption may only be modified in the same manner and under the same conditions as a decree of adoption may be modified under Section 228.10 or 228.15."

Colorado. Designates Official Text provisions as subsec. (1), and adds a subsec. (2) which reads: "The court may modify an order of support only in accordance with the provisions of and the standard for modification in section 14-10-122, C.R.S."

Hawaii. Designates Official Text provisions as subsec. (a), and adds a subsec. (b) which reads: "(b) In those cases where child support payments are to continue due to the adult child's pursuance of education, the child support enforcement agency, three months prior to the adult child's nineteenth birthday, shall send notice by regular mail to the adult child and the custodial parent that prospective child support will be suspended unless proof is provided by the custodial parent or adult child, to the child support enforcement agency, prior to the child's nineteenth birthday, that the child is presently enrolled as a full-time student in school or has been accepted into and the plans to attend as a full-time student for the next semester a post-high school university, college or vocational school. If the custodial parent or adult child fails to do so, prospec-

tive child support payments may be automatically suspended by the child support enforcement agency, hearings officer, or court upon the child reaching the age of nineteen years. In addition, if applicable, the agency, hearings officer, or court may issue an order terminating existing assignments against the responsible parent's income and income assignment orders."

New Mexico. Section reads: "The court has continuing jurisdiction to modify or revoke a judgment or order for future support."

Wyoming. The provisions of W.S.1977 § 14-2-113(f), set out in the variation note in the main volume, now read: "(f) The court has continuing jurisdiction to modify a judgment or order made pursuant to W.S. 14-2-101 through 14-2-120. Provisions respecting support may be modified only upon a showing of a substantial and material change in circumstances. If any order of support provides for periodic payments or installments to the clerk of court, any amount unpaid at the time it is due shall become a judgment by operation of law. An order for child support is not subject to retroactive modification except the order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner."

Notes of Decisions

- Child support 3
- Common law 1
- Construction with other laws 3
- Law governing 2

1. Construction with other laws

Best interests of the child standard for modification of a child support order under the Parentage Act, is different than the material change in circumstances standard under the statute applicable to divorced parents. *State ex rel. Dix v. Plank*, 1989, 780 P.2d 171, 14 Kan.App.2d 12.

Vote: The MOTION CARRIED by a roll call vote, with SENS. BARTLETT, DOHERTY AND HALLIGAN voting, "no".

{Tape: 1; Side: B; Approx. Counter: 00}

EXECUTIVE ACTION ON SB 286

Motion: SENATOR HALLIGAN MOVED THAT SB 286 DO PASS.

Discussion: SENATOR HOLDEN asked SENATOR HALLIGAN about a "Sassy" file and he wondered why it was significant.

SENATOR HALLIGAN said that the amendments requested were not appropriate for the case, but rather for paternity cases. The suggestions could not be included under the title, he said.

Vote: The MOTION CARRIED unanimously on oral vote.

EXECUTIVE ACTION ON SJR 6

Discussion: Valencia Lane explained that SENATOR BROWN had passed out two possible amendments, one would clarify that the adoption of this resolution does not constitute an application for a Constitutional Convention. The other was possible amendments to increase the size of the delegation from five to seven. SENATOR LORENTS GROSFIELD had asked her to prepare the first amendment. It is numbered sjr0601.avl.

Motion: SENATOR GROSFIELD MOVED THE AMENDMENT.

Motion: SENATOR DOHERTY said he intended to vote for the amendment, but the comments of Gary Marbut and Betty Babcock in this uncharted area would be wise to be remembered. This may give some degree of comfort, he said, but we may well end up with a Constitutional Convention.

SENATOR BAER said he had prepared an amendment, as well, that may be included in a substitute motion, if they wished. He would add as a Subsection 7, "in no way does this resolution express nor imply an intent or desire for its evolution into or instigation of a Constitutional Convention, the convening of which this resolution definitively opposes.

SENATOR BISHOP likes the proposed amendment a lot better, but the drafter should have some liberty to work with it.

CHAIRMAN CRIPPEN read, "the legislature of Montana opposes any possibility of the Conference of States evolving into a federal Constitutional Convention."

DATE 2-8-95

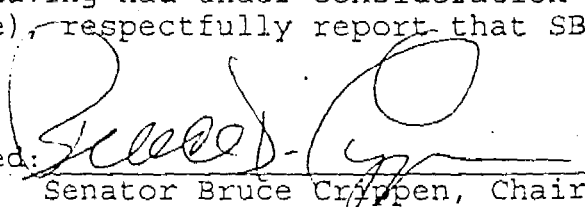
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SENATE STANDING COMMITTEE REPORT

Page 1 of 1
February 8, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 286 (first reading copy -- white), respectfully report that SB 286 do pass.

Signed: 

Senator Bruce Crippen, Chair

 Amd. Coord.
Sec. of Senate

331422SC.SRF

Mr. Alke said that was correct.

{Tape: 2; Side: A; Approx. Counter: 13.6}

Closing by Sponsor:

SEN. BISHOP said in closing that it was plain that some action must be taken. He addressed the suggestion that the supreme court would not look on anything done in the legislature favorably. He said that the court pointed out what the legislature must do in the Newville case and he cited the source of that opinion. He said he thought the Wetch case was not fair and that it was up to the legislature to do something about it.

HEARING ON SB 286

Opening Statement by Sponsor:

SEN. FRANKLIN, SD 21, said SB 286 was brought to her by an attorney and former justice of the peace as a measure to deal with pre-trial costs. It would put in statute that when a paternity case is determined, the judge may include an order for pre-trial costs.

Proponents' Testimony:

Jim Elshoff, Great Falls Attorney, said there was no provision within the current act for recovery of attorney fees and court costs. He submitted written testimony along with a copy of the Parentage Act. EXHIBIT 15

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. KOTTEL asked the sponsor about the fiscal note referring to the possible additional costs to the district court and wanted to know what it might cost the counties. The sponsor referred the question.

Mr. Elshoff said guardian ad litem fees were presently in the statute. He believed this would not have any impact on the counties per se. Without the legislation, the petitioner who brings a lawsuit currently may be required to apply for AFDC benefits and that the impact would be the same if the committee did nothing. Whatever that impact would be would be lessened if they were able to go to the other parent to get child support from them.

REP. KOTTEL asked if the court would take into consideration whether or not the party was financially able to pay the costs.

Mr. Elshoff said section 40-4-110, MCA, essentially says that the court shall consider the financial circumstances of both parties and may order either party to reimburse the other for fees.

Closing by Sponsor:

SEN. FRANKLIN closed.

{Tape: 2; Side: A; Approx. Counter: 35.0}

HEARING ON SB 192

Opening Statement by Sponsor:

SEN. FRED VAN VALKENBURG, SD 32, said that SB 192 would provide that the salary of the county prosecutor services coordinator would be equivalent of that of a full-time county attorney.

Proponents' Testimony:

Attorney General Joe Mazurek, supported the bill and informed the committee that neither the Department of Justice nor John Connor, who presently holds the position, had asked for the bill. The sponsor had initiated the bill and the department was fully in support of it. He outlined the duties of the position and the importance of it.

Leo Giacometto, Governor's Office, outlined the need for the position and their strong support of this bill.

Loren Tucker, Madison County Attorney, Montana County Attorney's Association, attested to the attributes, dedication and hard work of the people who have held the position. In order to retain the high quality of personnel needed in the position and the required diversity of skills, the incumbent and any future recruit for it should be paid at a competitive level. As a part-time county attorney, he echoed the contents of a letter he presented from another part-time county attorney in presenting examples of the quality of work and the quantity of work exercised by this position. EXHIBIT 16

Dennis Paxinos, Yellowstone County Attorney, asked who would move to Helena to take a \$10,000-a-year cut in pay to take the job. He said there is no attraction for the position at its current rate of pay. He said the county attorneys are paid more than the person in this position which trains the county attorneys throughout the state. The position often requires the prosecution of cases for county attorneys who are paid more than the incumbent.

John Flynn, Broadwater County Attorney, said the creation of this position was the biggest help in fighting crime, particularly violent crime, in the state. For the state to keep this

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL

DATE 3/3/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓ 9:30	✓	
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓	9:20 ✓	
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓	9:25 ✓	
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

Mr. MacMaster continued to discuss the wording of the bill regarding the provision.

Motion/Vote: REP. WYATT MOVED TO AMEND BY INCLUDING THE WORDING, "PROCEEDINGS FILED AFTER JULY 1, 1995" ON LINE 9, PAGE 2. The motion carried unanimously.

Discussion: REP. BILL TASH rose in opposition to the bill because he felt it added one more level of confusion for the jury.

REP. WYATT said it was her understanding that the jury does not know that the 10% is to be awarded and therefore it would not have the impact on the jury which was suggested.

REP. KOTTEL said subsection 3 addressed the concern that juries add in interest automatically and that section is current law. She said the jury is not told what the interest rate is or who will receive the interest. She said the proposed legislation does not change what the jury hears therefore it is not more confusing for them.

REP. TASH appreciated what she was saying as far as instructions to the jury, but the fact was that it did create some precedent-setting confusion based on the jury's understanding and the judge's understanding particularly on how difficult it is to recruit juries based on some of the complexities in the judicial system. Therefore, he would continue to oppose the bill.

Vote: The motion on HB 517 as amended carried by roll call vote, 10 - 7.

[NOTE; The standing committee report was held by request of Vice Chair Anderson and Chairman Clark. The committee voted to reconsider on March 13 and action was postponed until March 15 when it was passed out of committee as previously amended.]

CHAIRMAN CLARK relinquished the chair to VICE CHAIR WYATT.

{Tape: 2; Side: A; Approx. Counter: 52.1}

EXECUTIVE ACTION ON SB 286

Motion: REP. TREXLER MOVED SB 286 BE CONCURRED IN.

Discussion: REP. MC GEE asked who is currently paying the fees in the actions.

REP. HURDLE said there is no present recovery of attorney fees and court costs. This would comply with the U. S. Parenting Act by making both parents responsible.

REP. MC GEE asked if REP. GRIMES had any information on the bill.

REP. GRIMES said at first glance they were taking it from being paid by the state to being paid by the users.

Vote: The motion carried unanimously, 18 - 0.

EXECUTIVE ACTION ON SB 175

Motion: REP. SMITH MOVED SB 175 BE NOT CONCURRED IN.

Discussion: Mr. MacMaster discussed some of the effect of the amendments and the problems they would create. He thought an enterprising attorney would claim that it would not just grant immunity from prosecution in a criminal action, but also would grant civil immunity. He thought the amendments should say, "may grant a use derivative immunity by the states from prosecution."

REP. KOTTEL asked if it was not true that they could not grant a civil immunity without a two-thirds vote.

Mr. MacMaster said a two-thirds vote is needed on an immunity bill only in dealing with a governmental entity.

REP. SOFT said he could not support the bill. He submitted that if an offender admitted to a sexual offense only because they knew they would not be prosecuted, that would not be a heart-felt, soul-felt admission which would lead to recovery, but only done to avoid prosecution. In working with youthful offenders, the success is based on admission of guilt with the provision of making amends or restitution to the victims including asking forgiveness. That cannot be accomplished if the admission is only given when it is known that prosecution would be avoided. He said another problem was that the decisions are placed in the hands of county attorneys who are not the treatment officials.

REP. KOTTEL explained her dilemma in deciding to oppose the bill. She said the first issue was with charging someone with perjury as a new crime because of admission in treatment subsequent to denial made during their defense at trial. She said the part of the bill she did not like was that it also would protect them from admissions made in therapy regarding other crimes. She did not know how to protect them just from the perjury side while knowing that a no vote would bring sex offender treatment programs to a halt in the state.

Motion/Vote: REP. TREXLER MOVED TO TABLE SB 175. The motion carried 15 - 1, REP. BILL CAREY voted no. (REPS. ANDERSON, AHNER, BERGMAN, CLARK and BOHARSKI were absent, REPS. AHNER and BERGMAN voted by proxy.)

EXECUTIVE ACTION ON SB 372

Motion: REP. SHEA MOVED SB 372 BE CONCURRED IN.

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL

DATE 3/9/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		✓
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓ 9:15	✓	
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓ 9:15	✓	
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		



HOUSE STANDING COMMITTEE REPORT

March 9, 1995

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 286 (third reading copy -- blue) be concurred in.

Signed: Bob Clark
Bob Clark, Chair

Carried by: Rep. Bohlinger

Committee Vote:
Yes 18, No 0.

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